83-51

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

BONDED ELEVATOR, INC. and
FRANK CORUM, Executor of the
Estate of Deceased Otto Corum - - Petitioners

versus

FIRST AMERICAN NATIONAL BANK OF NASHVILLE - - - Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RICHARD M. TRAUTWEIN
BARNETT & ALAGIA
The Fifth Avenue Building
444 South Fifth Street
Louisville, Kentucky 40202
(502) 585-4131
Counsel of Record for Petitioners

MARION EDWYN HARRISON
D. PAUL ALAGIA
ROBERT W. BISHOP
BARNETT & ALAGIA
1000 Thomas Jefferson
Washington, D. C. 20007
(202) 342-0342
Associated Counsel for Petitioners

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals depart from the accepted and usual course of judicial proceedings and deny petitioners due process of law by:

A. Refusing to certify to the Kentucky Supreme Court the determinative question of state law when the identical question was then pending before the Kentucky Supreme Court in a companion case?

B. Relying upon a Kentucky intermediate appellate court opinion in the companion case that was not final and could not be relied upon as authority under the controlling rules of the Kentucky Supreme Court?

C. Upholding a particular use of a loan receipt under the law of Kentucky where that use had been expressly forbidden by prior decision of the Kentucky appellate court of last resort?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties.

DESIGNATION OF CORPORATE RELATIONSHIPS

Bonded Elevator, Inc., filing this petition for certiorari as petitioner in this proceeding, states that:

This is its original designation of corporate relationships.

Bonded Elevator, Inc. is not owned by any parent corporation.

Bonded Elevator, Inc. does not have an ownership interest in any non-wholly owned subsidiaries.

Bonded Elevator, Inc. does not have any affiliates.

Dated: July 8, 1983.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No.

BONDED ELEVATOR, INC. and
FRANK CORUM, Executor of the Estate
of Deceased Otto Corum - - *Petitioners*

v.

FIRST AMERICAN NATIONAL
BANK OF NASHVILLE - - - *Respondent*

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The order/opinion of the Court of Appeals below (appendix I, *infra,* pp. 1a-3a) was not reported. The memorandum opinion of the District Court below (appendix I, *infra,* pp. 4a-6a) was not reported.

The order of the Supreme Court of Kentucky granting motion for discretionary review (appendix II, *infra,* p. 7a) was not reported.

JURISDICTIONAL GROUNDS IN THIS COURT

The order of the Court below (appendix I, *infra,* pp. 1a-2a), which is sought to be reviewed, was entered on February 2, 1983. Rehearing was denied by order entered on April 12, 1983 (appendix I, *infra,* p. 3a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Fifth Amendment, United States Constitution, which provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . .

2. The Tenth Amendment, United States Constitution, which provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

3. 28 U.S.C. §1652, which provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

A. Nature of The Case

The decision to be reviewed involves litigation initiated in the District Court by respondent, First American National Bank of Nashville ("Bank"), against petitioners, Otto Corum ("Corum") and Bonded Elevator, Inc. ("Bonded"), and against SLT Warehouse Company ("SLT"). The complaint alleged:

1. Failure by SLT to deliver grain collateral under its warehouse receipts and negligent loss of the grain collateral;

2. Failure by Corum to pay a guarantee of a promissory note with a principal balance of $2,082,490.33, and interest to date of judgment of $486,775.04, a total of $2,569,265.37; and

3. Failure by Bonded to pay a promissory note with a principal balance of $2,082,490.33, and interest to date of judgment of $810,559.51, a total amount of $2,893,049.84.

On December 20, 1980, SLT entered into an agreement with warehouseman's legal liability insurers (basic and excess) styled a "Loan Receipt and Agreement." By this document, the legal liability insurers purported to "loan" SLT $2,350,000.00 conditioned upon SLT's agreement to immediately relend $2,350,000.00 to Bank.

On December 22, 1980, SLT entered into an agreement with Bank. SLT purported to "loan" the Bank $2,350,000.00.

On February 11, 1982, the District Court refused requested relief under Federal Rule of Civil Procedure 60(b) from final partial summary judgment for Bank against Corum entered on May 21, 1980, and from final partial summary judgment for Bank against Bonded entered on May 4, 1981.

B. Course of Proceedings

On December 13, 1978, Bank filed its suit in the District Court against Bonded, Corum and SLT.

On May 21, 1980, the District Court entered final summary judgment against Corum, *supra*, and further, dismissed Corum's counterclaim against the Bank.

On December 20 and 22, 1980, the insurers, SLT and Bank entered into the two-step loan scheme.

Also, on December 22, 1980, SLT and Bank entered into a stipulation dismissing Bank's complaint against SLT with prejudice. The order dismissing the complaint was entered on December 30, 1980.

By an opinion dated April 15, 1981, and by final partial summary judgment dated May 4, 1981, the District Court entered final partial summary judgment against Bonded, *supra*.

On June 22, 1981, Corum and Bonded first obtained access to some of the SLT/Bank settlement documents.

On July 30, 1981, Bonded and Corum moved, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure for relief from judgments entered against them.

On February 11, 1982, the District Court entered its memorandum opinion holding that it "would not be inclined to grant relief pursuant to 60(b) in this matter." The Court's disinclination was based upon the continued pendency of Corum and Bonded's cross-claims against SLT.

On February 19, 1982, Bonded and Corum filed their notice of appeal from the District Court's February 11, 1982, refusal of relief.

On July 9, 1982, the District Court entered its memorandum and order denying Corum's motion to stay proceedings to enforce judgment.

On July 15, 1982, Otto Corum died. On November 4, 1982, the District Court entered its order substituting Frank Corum, as executor of the estate of Otto Corum, as a defendant in the cases.

On June 1, 1982, Bonded and Corum moved the Court of Appeals to stay the appeal until determination by the Kentucky Court of Appeals of the identical issue of the validity under Kentucky law of a "loan receipt agreement" in a third party settlement context in a related case.

On June 18, 1982, the Court of Appeals denied Bonded and Corum's motion for stay.

On January 5, 1983, Bonded and Corum filed a suggestion to certify question of Kentucky law to the Supreme Court of the Commonwealth of Kentucky with the Court of Appeals. The basis for the suggestion was that the identical question of Kentucky law was presently pending before the Kentucky Supreme Court on a motion for discretionary review in the companion case of *Bonded Elevator, Inc.* v. *First National Bank of Louisville,* Kentucky Supreme Court file no. 82-SC-729-D.

On January 14, 1983, the Court of Appeals entered its order denying Bonded and Corum's "motion to certify question of Kentucky law to the Supreme Court of the Commonwealth of Kentucky," but did so "without prejudice to its being presented as part of the appellants' appeal."

On January 26, 1983, the appeal was argued before the Sixth Circuit and the suggestion that the question of Kentucky law be certified to the Supreme Court of Kentucky was once more advanced.

On February 2, 1983, the Court of Appeals entered its order affirming the judgment of the District Court below that permitted a settling co-defendant, SLT, to use a "loan receipt" fiction to secure and enforce plaintiff Bank's jural rights against the non-settling co-defendants, Corum and Bonded, when those jural rights would not otherwise have been available to the settling co-defendant.

On February 9, 1983, the Supreme Court of Kentucky granted discretionary review in the said related case of *Bonded Elevator, Inc.* v. *First National Bank of Louisville* (appendix II, *infra,* p. 7a), which case presented the same issues as were before the Court of appeals.

On February 16, 1983, Bonded and Corum filed their petition for rehearing and suggestion to certify question of Kentucky law to the Supreme Court of Kentucky with the Court of Appeals.

On April 12, 1983, the Court of Appeals entered its order denying Bonded and Corum's petition for rehearing and refusing to certify the question of Kentucky law to the Supreme Court of Kentucky.

C. Statement of the Facts

Bank's complaint alleged that Bonded had defaulted in its payment of a promissory note executed in the principal amount of $2,500,000.00. The note was secured by warehouse receipts issued by SLT. The warehouse receipts represented grain owned by Bonded, but entrusted to and physically held by SLT, the field warehouseman, to secure the Bank for moneys ad-

vanced under loan agreement. Corum guaranteed payment of the loan.

On August 28 or 29, 1978, SLT, which had been aware of grain shortages since at least June or July of 1978, and possibly as early as March of 1978, finally informed Bank that substantially all of the grain collateral was missing.

On November 1, 1978, Bank gave notice to Bonded, SLT and Corum demanding payment of the note and accrued interest. SLT has never delivered the grain it was warehousing.

On December 20, 1980, the co-defendant, SLT, entered into an agreement with its warehouseman's legal liability insurers (basic and excess) styled a "Loan Receipt and Agreement."

On December 22, 1980, SLT entered into an agreement with Bank also styled a "Loan Receipt and Agreement."

On December 22, 1980, SLT and Bank entered into a stipulation dismissing Bank's complaint against SLT. Neither the Court nor counsel for Corum and Bonded was informed of any of the foregoing agreements until counsel for Corum and Bonded obtained copies of the two agreements on June 22, 1981.

The settlement scheme set out in the above agreement provided for a two-tier set of "loans." SLT's liability insurers "loaned" \$2,350,000.00 to SLT in the form of a non-interest bearing "loan" repayable "only in the event and to the extent of any actual net monetary recovery (of) SLT (from) . . . Bonded and Corum. . . ." The agreement between SLT and

Bank identically provided for the "loan" of $2,350,000.00 by SLT to Bank. The non-interest bearing loan was "repayable only in the event and to the extent of any actual monetary recovery (Bank) may obtain (from) . . . Bonded (and Corum)."

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

The District Court for the Western District of Kentucky had jurisdiction over this case under 28 U.S.C. §1332, Diversity of Citizenship.

REASONS FOR GRANTING WRIT

Introduction

This is a diversity case. It involves the application of the law of the Commonwealth of Kentucky. There are no factors requiring a uniform national rule. The Court of Appeals was "in effect" only another court of the Commonwealth of Kentucky . *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 (1938); *Angel* v. *Bullington,* 330 U. S. 183 (1946); *Miree* v. *DeKalb County,* 433 U. S. 25 (1977). There was then and is presently pending in the Kentucky state courts a companion case to the present case. At the time the Court of Appeals rendered its decision, the companion case was pending in the Kentucky appellate courts.

The Court of Appeals based its decision upon a non-final "not to be relied upon" opinion of the Kentucky intermediate appellate court in the companion case. Rules 76.28(4) and 76.30(2)(d) of the Kentucky Rules of Civil Procedure.

The Court of Appeals not only violated the rules of the Kentucky Supreme Court by relying upon the non-final opinion, but refused to follow or cite the controlling Kentucky state court of last resort precedent.

The Supreme Court of Kentucky then granted discretionary review of the Kentucky intermediate appellate court decision in the companion case. Upon petition for rehearing and despite the grant of discretionary review of the companion case, the Court of Appeals refused to certify the identical question of law to the Kentucky Supreme Court.

These refusals are a denial to petitioners of due process of law under the doctrine of *Erie R. Co.* v. *Tompkins, supra.* The Court held in *Erie* that:

> Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the state. *Swift* v. *Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States the doctrine had prevented uniformity in the administration of the law of the state. 304 U. S. at 74-75.

This Court has held that the due process clause of the Fifth Amendment to the United States Constitu-

tion ". . . tends to secure equality of law in the sense that it makes a required minimum of protection for everyone's right of life, liberty, and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general fundamental principle of the equality of application of the law." *Truax* v. *Corrigan,* 257 U. S. 312, 332 (1921). *See also Hirabayashi* v. *United States,* 320 U. S. 81, 100 (1943); *Frontiero* v. *Richardson,* 411 U. S. 677 (1973); *Jiminez* v. *Weinberger,* 417 U. S. 628 (1974); and *Department of Agriculture* v. *Murry,* 413 U. S. 508 (1973). The Court in *Erie* went on to state that:

> . . . We merely declare that in applying the doctrine this Court and the lower courts have invaded rights which in our opinion are reserved by the Constitution to the several states.

304 U. S. at 77-80. *See* the Tenth Amendment to the United States Constitution.

As pointed out by this Court in *Hanna* v. *Plumer,* 380 U. S. 460 (1965), the rule of *Erie* v. *Tompkins* is rooted in part in a realization that it would be unfair for the character or result of litigation materially to differ because suit had been brought in a federal court. The twin aims of *Erie* v. *Tompkins* are: discouragement of forum shopping and avoidance of inequitable administration of the law.

28 U.S.C. §1652, *supra,* provides that the laws of the several states shall generally be regarded as rules of decision in civil actions in the courts of the United States in cases where they apply. This Court has held

that under the requirement of this section, federal courts must follow state law in deciding state questions and that it is inadmissible that there should be one rule of state law for litigants in state court, and another rule for litigants who bring the same question before a federal court owing to circumstances of diversity of citizenship. *Fidelity Union Trust Company* v. *Field,* 311 U. S. 169 (1940), *reh. denied,* 311 U. S. 730, *reh. denied,* 314 U. S. 709. As held by the Court of Appeals in *Petersen* v. *Chicago Great Western R. Co.,* 138 F.2d 304 (8th Cir. 1943), a federal court is required to follow the same substantive rules in diversity cases that a state court would have applied in the particular case. The accident of diversity of citizenship may not operate to disturb equal administration of justice in coordinate state and federal courts. *Id.*

Federal court dockets are crowded. There *may* be valid reasons to limit diversity jurisdiction. There *are* valid reasons that there be no diversity in the application of law to facts solely because of the election to use a federal or state forum. This would inevitably result in a torrent of new federal cases, whether by election of the plaintiff or removal by the defendant.

The Court of Appeals' refusal to follow the then-controlling precedent of the Kentucky court of last resort and reliance upon a non-final opinion of an intermediate appellate court can only encourage forum shopping.

With the identical issue pending before the Supreme Court of Kentucky in a companion case, it is

difficult to conceive of justification for refusing to stay or certify. It would result in uniformity. It would prevent simple injustice.

The determination of whether the refusal to defer to the state court is a departure from the holding of *Erie,* from the principles of comity, and from the accepted and usual course of judicial proceedings, can be analytically assisted by the examination of the three questions presented.

If this record demonstrates petitioners' contentions, then there are special and important reasons for review. *Supreme Court Rule* 17.1. It is respectfully suggested that the departures from the accepted and usual course of judicial proceedings demonstrate compelling reasons for review. *Supreme Court Rule* 17.1(a).

Did the Court of Appeals Depart from the Accepted and Usual Course of Judicial Proceedings and Deny Petitioners Due Process of Law by:

A. Refusing to Certify to the Kentucky Supreme Court the Determinative Question of State Law When the Identical Question Was Then Pending Before the Kentucky Supreme Court in a Companion Case?

The Kentucky Supreme Court has adopted a procedure for certification of questions of Kentucky law "by the Supreme Court of the United States [or] any Court of Appeals of the United States." Ky.R.Civ.P. 76.37. This procedure has been utilized and approved by the Court of Appeals below in *Union Light, Heat & Power Company* v. *U. S. District Court,* 588 F. 2d 543 (6th Cir. 1978). The Court of Appeals there stated that:

> This rule should serve to allow this Court to insure that no Federal Court interpretation of Kentucky law in these cases becomes final before a final decision on the same issue by the Supreme Court of Kentucky. 588 F. 2d at 544.

The question of Kentucky law before the Court of Appeals was whether a series of loans could be used to obtain the jural rights of a third party to be enforced against another third party. This arrangement violates the Kentucky high court's last pronouncement on loan receipts in *Biven* v. *Charlie's Hobby Shop*, Ky., 500 S.W.2d 597 (1973), *infra*, being merely an indirect attempt to accomplish what was forbidden directly in that case.

Whether or not the Kentucky courts will continue to be controlled by the holding in *Biven* is presently pending before the Kentucky Supreme Court in the companion case of *Bonded Elevator, Inc.* v. *First National Bank of Louisville, supra.* Discretionary review was granted in this case by the Kentucky Supreme Court on February 9, 1983. A motion for discretionary review by the Kentucky Supreme Court ". . . is a matter of judicial discretion and will be granted only when there are *special reasons* for it." Ky.R.Civ.P. 76.20 (emphasis supplied).

Briefing was completed in the companion state court case on April 26, 1983. Oral argument was heard on June 30, 1983. The decision by the Kentucky Supreme Court will be forthcoming in the near future. In its order of April 12, the Court of Appeals acknowledged that it was the "determinative issue in

the present appeal." If the Kentucky Supreme Court continues to follow *Biven* and reverses its intermediate appellate court, there will be a *direct conflict in companion cases between the state and federal courts* although the federal system is bound to apply state law. This is the unjust result held unconstitutional in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64 (1938). Bonded and Corum moved the Court of Appeals to certify this question of Kentucky law to the Supreme Court of Kentucky on January 5, 1983, January 26, 1983, *and February 16, 1983, after the state Supreme Court grant of discretionary review.*

The Seventh Circuit was faced with a very similar question in *Wecker* v. *Kilmer,* 471 F.2d 782 (1972). The question presented was whether a physician who is not a party to a general release in regard to injuries sustained in an Indiana automobile accident was entitled to benefit of the release, although he paid no part of the consideration. The Court of Appeals found that the question was one of Indiana law, that the answer would determine the appeal, and that there were no clear controlling precedents in the decisions of the Supreme Court of Indiana. The Court of Appeals held that:

> [A]ccordingly this is an appropriate question to be certified to that Court pursuant to appellate rule 15(N) effective November 15, 1972. *Id.* at 783.

The Fifth Circuit was faced in *Maryland Casualty Company* v. *Hallatt,* 326 F.2d 275 (1964), with a situation where it had decided a case based on Florida law. Subsequently "the Florida court categorically

and by name rejected the opinion of this Court and specifically adopted the dissenting opinion as correctly enunciating the law of Florida." When the case came up before the Fifth Circuit on appeal from remand that Court of Appeals was afforded an opportunity to correct itself. The Court stated that:

> The Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were 'dead wrong.' The Florida Court in *Barnes* has saved us from committing a miscarriage of justice. We are not insensible to possible complications but are of the opinion that under the total circumstances it is our duty to conform our decision to the supervening decision of the State Court, such decision being under *Erie* the right decision. *Id.* at 277.

This Court has lent its approval to certification of state law questions in diversity cases to state supreme courts in *Lehman Brothers* v. *Schein,* 416 U. S. 386 (1974). The Court there observed that "the dissenter on the Court of Appeals urged that that Court certify the state law question to the Florida Supreme Court as is provided in Fla. Stat. Ann. §25.031 and its Appellate Rule 4.61. That path is open to *this Court* and to any Court of Appeals of the United States. 478 F.2d, at 828. We have, indeed, used it before, as have Courts of Appeal." 416 U. S. at 389 (footnotes omitted).

This Court stated that such a certification procedure "does, of course, in the long run save time, energy,

and resources and helps build a cooperative judicial federalism." 416 U. S. at 391. *This Court* then vacated the judgment of the Court of Appeals and remanded for reconsideration whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules. *Id.*

It is respectfully submitted that this Court should review the Court of Appeals refusal and remand the matter for reconsideration of or certification of the question. Alternatively, it is respectfully suggested that this Court should, upon review, itself utilize the Kentucky certification procedure available to it to determine the important and determinative issue of Kentucky law. *Aldrich* v. *Aldrich,* 375 U. S. 249 (1963); *Dresner* v. *City of Tallahassee,* 375 U. S. 136 (1963).

Did the Court of Appeals Depart from the Accepted and Usual Course of Judicial Proceedings and Deny Petitioners Due Process of Law by:

B. Relying Upon a Kentucky Intermediate Appellate Court Opinion in the Companion Case That was Not Final and Could Not be Relied Upon as Authority Under the Controlling Rules of the Kentucky Supreme Court?

In holding that the attempted extension of the "loan receipt" fiction was neither partial satisfaction nor champertous, and therefore denying Bonded and Corum relief from the judgments against them, the Court of Appeals reasoned in its February 2, 1983, order that:

> These arguments were made to the Kentucky Court of Appeals in the related cases of *Bonded Elevator, Inc.* v. *First National Bank of Louisville,* 82-CA-960-MR and 82-CA-822-MR, decided August 23, 1982. The Kentucky Court of Appeals rejected each of the arguments and upheld the loan transaction. We find this clear expression of law by the appellate court, which is in agreement with the views of the experienced district judge sitting in Kentucky, to be compelling.

On February 9, 1983, the Supreme Court of Kentucky granted discretionary review in the said related cases.

The Court of Appeals' reliance, in its February 2 opinion, *supra,* and in its April 12, 1983 denial of the hearing, upon the Kentucky Court of Appeals' decision of Bonded Elevator, Inc., was misplaced.

Prior to and after oral argument, Bonded and Corum suggested to the Court of Appeals that:

(a) A motion for discretionary review was pending before the Kentucky Supreme Court in a related Bonded Elevator, Inc. case, *supra,* and was ultimately granted;

(b) The Kentucky Court of Appeals decision in that related case was, therefore, not final (citing Ky.R.Civ.P. 76.30);

(c) The question of the limits to the use of the loan receipt fiction has serious import for Kentucky jurisprudence and has either been decided contrary to

the District Court's decision herein by *Biven, infra,* or is undecided;

(d) Uniformity between the decision by the Court of Appeals in the Kentucky Supreme Court on this question should be obtained; and

(e) The question should, therefore, be certified to the Kentucky Supreme Court (citing Ky.R.Civ.P. 76.37).

The law of Kentucky is that an opinion of the Kentucky Court of Appeals is not final pending a motion for a grant of discretionary review to the Kentucky Supreme Court. Ky.R.Civ.P. 76.30(2)(d) states in pertinent part that:

> Unless otherwise ordered . . . in no event shall an opinion become final pending final disposition of . . . a timely motion under Rule 76.20 [for discretionary review] . . . (emphasis and parenthetical supplied.)

Reliance on such a non-final opinion is expressly forbidden in Kentucky.

The non-final, unpublished opinion of the companion case is not authority and may not be relied upon as authority. *Yocum* v. *Justice,* Ky. App., 569 S. W. 2d 678, 679 (1977). *Yocum* holds:

> The purpose of this opinion is to serve notice upon the Bar, generally that in future cases in which unpublished opinions are cited, we will entertain motions to strike the offending counterstatement and if the circumstances warrant, deny leave to refile.

In accord is *Jones* v. *Commonwealth of Kentucky*, Ky. App., 593 S. W. 2d 869, 871 (1969).

In addition to its failure to exercise sound discretion in advancing judicial efficiency and federal comity, *supra*, the Court of Appeals erred in relying upon a non-final Court of Appeals decision which Kentucky law makes perfectly clear should not be relied upon. It is respectfully submitted that this Court should grant review for purposes of reversal of this error.

Did the Court of Appeals Depart from the Accepted and Usual Course of Judicial Proceedings and Deny Petitioners Due Process of Law by:

C. Upholding a Particular Use of a Loan Receipt Under the Law of Kentucky Where That Use Had Been Forbidden by Prior Decision of the Kentucky Appellate Court of Last Resort?

SLT's "loan receipt" agreement with Bank required:

1. Bank to dismiss with prejudice its claims against SLT;

2. Bank to repay SLT, without interest, only to the extent of its recovery from Bonded, *or any other person;*

3. Bank not to settle with Bonded or Corum or any related person (without approval of SLT);

4. Bank to cooperate fully with SLT in Bank's claims against Bonded and Corum, ". . . *all such* proceedings to be prosecuted, settled, or dismissed, at

the risk and expense, including attorneys' fees, of SLT and under SLT's exclusive direction, management and control"; and

5. *Bank's appointment of SLT as agent and attorney-in-fact of Bank.* SLT now controls Bank in this litigation and has had such control under its "loan receipt agreement" since December 22, 1980.

By operation of Kentucky law, Bank's judgment against Bonded has been satisfied to the extent of the payment by SLT. Even though there are two defendants to Bank's claim, there is the right of only one recovery.[3]

The twin pillars of modern loan receipt law in Kentucky are *Aetna Freight Lines, Inc.* v. *R. C. Tway Company*, Ky., 298 S. W. 2d 293 (1956) and *Biven, supra.*

The holding of *Tway* is that loan receipts are permissible where an *insurance company* has made a purported loan to its *insureds* to avoid jury prejudice

---

[3]*O'Bryan* v. *Peterson*, Ky. App., 563 S. W. 2d 732, 735 (1978); *W. R. Grace & Company* v. *Hargadine*, 392 F. 2d 9, 18 (6th Cir. 1958); *Koster's* v. *Southern Opt. Co.*, 595 F. 2d 347, 355, 356 (6th Cir. 1979); *Coleco Industries, Inc.* v. *Berman*, 567 F. 2d 559 (3d Cir. 1977), *cert. den.*, 439 U. S. 830 (1978); *reh. denied*, 439 U. S. 998 (1978). *See also* dissenting opinion of Chief Justice Reed in *Sanderson* v. *Hughes*, Ky., 526 S. W. 2d 308, 309 (1975). *See also* Professor Kenneth B. Germain's Kentucky Law Survey of Remedies, 64 Ky.L.J. 245, 246 (1975) where it is pointed out that it is: "a . . . basically 'equitable' principle that the plaintiff was entitled to but one compensation for his loss, and that satisfaction of this claim, even by a stranger to the action, would prevent its further enforcement. [*Prosser*, §48, at 299.] Today, the 'one cause of action' rule has fallen into disrepute, whereas the 'one satisfaction' rule is still in good standing."

against insurance companies. This was not the *purpose* of the second-tier "loan receipt" agreement fiction between SLT and Bank. Its purpose was to enable SLT to recover its payment to Bank from Bonded without an adjudication of the cross-claims, and their defenses, of the two co-defendants.

This prejudicially changes jural relationships. This was neither attempted by the parties in *Tway* nor authorized by *Tway*.

Biven is the most recent pronouncement on the subject by the Kentucky appellate court of last resort. It holds that a purported loan by a liability insurance carrier to a *third party claimant* is not a "loan" but is a payment. The *Biven* facts are as follows: Davis accidentally shot and killed Biven. Biven sued Davis. Davis' liability carrier entered into a loan receipt agreement with Biven. Biven secured the loan by pledging to the liability carriers all claims against other third parties. Biven, under the control of Davis' liability carrier, then brought suit against the seller and manufacturer of the pistol, alleging that it was defective. On these facts the Kentucky court refused to permit the use of the fictional language of the loan receipt to permit the liability insurer to step into the shoes of the claimants.

The Court found:

> We, therefore, hold that the loan receipt constitutes *nothing other than a release* and it was valid for such purpose. (Emphasis supplied.) 500 S. W. 2d at 599.

SLT is not an insurer. Bank is not an insured. The warehouse receipt agreement is not an insuring agreement. The prejudice-against-insurance-company rationale is simply not present.

Unless the Supreme Court of Kentucky is prepared to reverse *Biven,* Bank's fictional loan is nothing more than a partial settlement.

Biven clearly forbids SLT's insurers from employing the loan receipt fiction in a payment to Bank directly. SLT's insurers have therefore attempted to accomplish the same thing indirectly. The fact that SLT's insurers thereby took over the cause of an unrelated third-party plaintiff, Bank, not their insured, to pursue against their insured's, SLT's, co-defendants, thereby circumventing cross-claims and defenses, is the motivation for the attempt.

This two-step "loan receipt" fiction is, of course, no more of a "loan" than the more direct attempt to take over the plaintiff's cause against co-defendants forbidden by *Biven.* It is not saved by any legitimate excuse for a "loan receipt" fiction, such as avoiding undue jury prejudice. It is subject to exactly the same objections and infirmities as the *Biven* "loan receipt."

It is significant that, although repeatedly cited to them by Bonded and Corum, neither the District Court, in its memorandum opinion, nor the Court of Appeals, in its orders denying Bonded and Corum relief from judgment, made any reference whatsoever to this controlling Kentucky high court case of *Biven.*

Law journals considering the matter have commended the Kentucky court's approach in *Biven*. For example, in *Loan Agreement: A Settlement Device That Deserves Close Scrutiny*, 10 Val. U. L. Rev. 231, 239-40 (1976), the author extolled the Kentucky Court's treatment of "loan receipts" as follows:

> . . . One approach has been to recognize the label, loan receipt agreement, as a mere fiction, and to decide if the equities in the given case justify the use of a fiction. For instance, the Kentucky Supreme Court in *Aetna Freight Lines, Inc. v. R. C. Tway Company*, expressly recognized that the difference between a loan under a loan receipt and an absolute payment under a policy is a mere fiction. But the context in which the loan receipt originated was decisive.
>
> The plaintiff had borrowed from his own liability insurer, essentially the same context in which the fiction was validated by *Luckenbach*. The Court upheld the transaction as a valid loan on two grounds: (1) *no party would be prejudiced by use of the fiction*, and (2) the insurer should be protected from jury bias.
>
> Seventeen years after the *Tway* decision, the Kentucky Supreme Court again expressly recognized loan receipts as a fiction, but this time denied their validity as a loan. The determinative factor was a change in factual context. *Tway* involved an insured and an insurer. The later Kentucky Supreme Court decision involved a loan receipt agreement between a plaintiff and one of two potentially liable tortfeasors. Commerce would not be facilitated, nor was there any contractual obliga-

> tion to provide indemnity to the plaintiff by the co-defendant. The needs which originally gave rise to the fiction were not present in the plaintiff/co-tortfeasor area . . . . Hence, where any party is prejudiced by the use of a fiction or where public policy is contravened, the fiction should be prohibited.

Similarly, at 56 Ky. L. J. 540-41 (1978), the Kentucky Law Survey emphasized the limitations *Biven* established for toleration of the "loan receipt" fiction as follows:

> It is common practice for insurance companies to settle first-party claims with their own insureds, then subrogate against a third-party tortfeasor.[67] Because of the natural prejudice juries often exhibit against insurance companies, the companies devised the 'loan receipt' method of settling with their own insureds. By this fiction, the company only loans the money to the insured who is then required to repay it from proceeds he might obtain in the suit against the third party. This allows the insurance company to finance the suit against the third party but bring it in in the name of its insured. This method of litigating subrogation claims has been approved in Kentucky.[68] However, the fiction is tolerated only insofar as the facts surrounding the settlement will support a 'loan' theory. ***Thus, in the 1973 case of Biven*** v.

---

[67] *See, e.g., State Farm Mut. Auto. Ins. Co.* v. *Roark*, Ky., 517 S. W. 2d 737 (1974); *New York Underwriters Ins. Co.* v. *Louisville & N.R.R.*, Ky., 148 S. W. 2d 710 (1941).

[68] *Ratcliff* v. *Smith*, Ky., 298 S. W. 2d 18 (1957); *State Farm Mut. Auto. Ins. Co.* v. *Hall*, Ky., 155 S. W. 2d 838 (1942).

Charlie's Hobby Shop,[69] *a 'loan receipt' was not allowed when the insurance company making the settlement was not the insurer of the injured party, both rather the insurer of another defendant.*[70] (emphasis supplied)

---

[69]Ky., 500 S. W. 2d 597 (1973).

[70]Note, however, that the insurance carrier of one joint tortfeasor, after having made settlement with the injured party, is subrogated to its insured's right to *contribution* from the other joint tortfeasor. *Automobile Club Ins. Co.* v. *Department of Highways*, Ky., 414 S. W. 2d 578 (1967); *Leitner* v. *Hawkins*, Ky., 223 S. W. 2d 988 (1979).

This is precisely the same relationship present in this case. The policy of promoting settlements is defeated by this extension of the legal fiction. The extension of loan receipts into the area of co-defendant plaintiff settlements *does not* simplify complex litigation or promote settlement. Just the contrary is the case. As pointed out by Thornton and Wick, *Loan Receipt Agreements: Are They Loans, Settlements, Wagering Contracts or Unholy Alliances?* Ins. Couns. J. 226, 228 (April, 1976):

> Not only does the non-settling defendant find himself hemmed in by his enemies, but the existence of the Loan Receipt diminishes his chances of affecting settlement with the plaintiff. The fact that the plaintiff is now well funded tends to put him in a litigious frame of mind, and the hope of recovering his loan payment insures that the settling defendant will encourage the plaintiff to push ahead with the litigation. Those courts which have found justification for Loan Receipt Agreements in the policy of the law that favors

settlement of legal controversies, fails to take account of the ultimate effect of these agreements. While their immediate result is settlement between the plaintiff and one of the defendants, Loan Receipt Agreements tend to promote, rather than discourage, litigation with a non-settling co-defendant.

See also 32 S.W.L.J. at 785-786; Scoby, *Loan Receipts and Guaranty Agreements,* 10 Forum 1300, 1313 (1975); and 10 Val. U.L.Rev. 251-52.

If the purported loan receipt is not construed as a release, then it is champertous, void, and SLT's payment satisfied Bank's judgment in whole or in part. The *Biven* court prevented the liability insurers there from buying the third-party plaintiff's cause of action by judicially rewriting the purported loan receipt.

In considering the ethics of "Gallagher" agreements,[5] a "settlement" device analogous to loan receipts, an increasing number of writers, and the one court which has squarely addressed the issue, have recognized them as champertous.

The Nevada Supreme Court held in *Lum* v. *Stinnett,* 87 Nev. 402, 488 P. 2d 347 (1971), that since the "loan receipt" agreements were motivated by the par-

---

[5]*Richfield Oil Corporation* v. *LaPrade,* 56 Ariz. 100, 105 P. 2d 1115 (1940). "Outside Arizona, Gallagher-type agreements are known as 'Mary Carter' agreements . . . ." 19 Ariz. L. Rev. 863, 865 (1977). Mary Carter, Gallagher and loan receipt agreements used in a plaintiff co-defendant settlement context are all non-judicial devices for limiting the exposure of one defendant at the expense of another. 25 DePaul L. Rev. 792 (1976).

ties' insurance companies, which were "strangers to the action," the agreements were champertous.

It is not difficult to imagine the potential ethical violations involved in such a "loan receipt" practice if the Kentucky high court had not already ruled in *Biven* that such "loans" are invalid from their inception and are to be treated as partial releases and satisfactions.[6] By so holding, the Court in *Biven* expressly avoided the necessity of holding that the "loan receipt" agreement was champertous. 500 S. W. 2d at 599.

CONCLUSION

It is respectfully submitted that the accident of Bank's diversity of citizenship should not cause Bonded and Corum to suffer a different, adverse result regarding the validity of the attempted extension of the "loan receipt" fiction under Kentucky law, from the results obtained by Bonded in the related case before the Kentucky courts. Under *Erie*, the Federal Courts must apply the Kentucky law already announced in *Biven* and anticipated to be reiterated by the Kentucky Supreme Court in the companion case.

---

[6]*See Stinnett, supra,* where the Court held the attorneys to be guilty of such ethical violations. *See also* the Arizona Bar's ethical pronouncement that third-party loan receipts violate the Code of Professional Responsibility. Finally, see the Kentucky Supreme Court's Rule 3.130 and the American Bar Association Code of Professional Responsibility, Ethical Considerations 5-1 and 7-28, and Disciplinary Rules 1-102(A) 4 and 5, regarding representation of conflicting interests, candor, fairness, and taking improper advantage over an adversary or technical advantage over opposing counsel. These are all serious ethical matters implicated by a scheme of third-party loan receipts.

This Court should review this case because of the failure of the Court of Appeals and the District Court to decide the matter according to the controlling authority of the state high court, or, alternatively, so that the matter may be remanded to the Court of Appeals for reconsideration of the certification procedure, or so that it may be certified directly by this Court to the Kentucky Supreme Court for a resolution of any doubts about the controlling state law. Failure to review will, very likely, in light of the Kentucky Supreme Court's grant of discretionary review in the related case presenting the identical issue, result in a failure of equal administration of justice in coordinate state and federal courts.

Respectfully submitted,

By ______________________

Richard M. Trautwein
The Fifth Avenue Building
444 South Fifth Street
Louisville, Kentucky 40202
(502) 585-4131

Counsel of Record for Petitioners

Barnett & Alagia

By ______________________

Marion Edwyn Harrison
D. Paul Alagia
Robert W. Bishop
1000 Thomas Jefferson
Washington, D. C. 20007
(202) 342-0342

Associated Counsel for Petitioners

INDEX TO APPENDIX

Appendix I

Opinions Below:

Appendix II

Other Appended Material:

No. 82-5110

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FIRST AMERICAN NATIONAL BANK OF NASHVILLE - - - - - *Plaintiff-Appellee*

v.

BONDED ELEVATOR, INCORPORATED, et al. - *Defendants*

BONDED ELEVATOR, INCORPORATED and FRANK CORUM, Executor of the Estate of Deceased Otto Corum - *Defendants-Appellants*

ORDER—Filed February 2, 1983

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Judge.

In this diversity case we are required to apply the substantive law of Kentucky. The defendants Bonded Elevator, Incorporated and Otto Corum appeal from an order entered by the district court on February 11, 1982, denying the motion of the appellants for relief pursuant to Rule 60(b), F. R. Civ. P., from partial summary judgments previously entered against them.

On appeal the defendants contend that Kentucky law prohibited the use of a transaction by which a co-defendant in the district court, SLT Warehouse Company, purported to loan to the plaintiff First American National Bank of Nashville, $2,350,000 which it had obtained from its liability insurers pursuant to a "Loan Receipt and Agreement." The defendants argue that the loan receipt is a release and the payment to the bank satisfied its judgments, and al-

ternatively, if the loan receipt is not a release it is champertous and void. These arguments were made to the Kentucky Court of Appeals in the related cases of *Bonded Elevator, Inc.* v. *First National Bank of Louisville,* NOS. 81-CA-960-MR and 82-CA-822-MR decided August 23, 1982. The Kentucky Court of Appeals rejected each of the arguments and upheld the loan transaction. We find this clear expression of law by the appellate court, which is in agreement with the views of the experienced district judge sitting in Kentucky, to be compelling.

The partial summary judgments entered by the district court on February 4, 1980 and May 21, 1980, and the order of the district court denying the motion for relief pursuant to Rule 60(b) entered on February 11, 1982, are affirmed. The cause is remanded to the district court for prompt trial of the remaining issues.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

No. 82-5110

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE - - - - *Plaintiff-Appellee*

v.

BONDED ELEVATOR, INCORPORATED, et al. - *Defendants*

BONDED ELEVATOR, INCORPORATED and
FRANK CORUM, Executor of the Estate
of Deceased Otto Corum - *Defendants-Appellants*

ORDER—Filed April 12, 1983

BEFORE: EDWARDS, Chief Judge; LIVELY, Circuit Judge; and PECK, Senior Circuit Judge.

Upon receipt and consideration of the petition for rehearing filed herein by the appellants Bonded Elevator, Inc. and Otto Corum and the court ordered response thereto filed by the appellee First American National Bank of Nashville, the court concludes that rehearing is not required. The grant of discretionary review by the Supreme Court of Kentucky in a case decided by the Kentucky Court of Appeals involving, *inter alia,* the determinative issue in the present appeal is not cause for this court to withdraw its earlier decision and certify a question to the Supreme Court of Kentucky.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF KENTUCKY
AT PADUCAH

Civil Action No. 78-0145-P

FIRST AMERICAN NATIONAL BANK OF NASHVILLE - *Plaintiff*

v.

BONDED ELEVATOR, INCORPORATED,
OTTO CORUM and
SLT WAREHOUSE COMPANY - - - *Defendants*

MEMORANDUM OPINION

This matter is before the Court on motions of Defendants Bonded Elevator, Inc. and Otto Corum requesting that a determination be made as to whether the Court would be inclined to grant relief, pursuant to Fed. R. Civ. P. 60(b), from summary judgments entered against each moving defendant. Both Bonded and Corum have appealed the judgments against them and, thus, if the Court is inclined to grant relief, Bonded and Corum could request the Sixth Circuit Court of Appeals to remand their case. *See First National Bank of Salem, Ohio* v. *Hirsch*, 535 F. 2d 343 (6th Cir. 1976). Plaintiff First National Bank has responded to defendants' motion, defendants have replied, and further discovery and briefing have transpired. Bonded and Corum also move to compel production of documents by First American and Defendant SLT Warehouse Company.

Bonded and Corum's claim for relief centers upon a loan receipt agreement executed between SLT and its insurers, and a subsequent loan receipt agreement between SLT and

First American. It is the contention of Bonded and Corum that due to the nature and true intent involved in these transactions, no *loan* has been extended to First American, but indeed the result has been the satisfaction of any judgment rendered in favor of the Bank. In response, the Bank has emphasized the validity of these transactions as a legitimate technique recognized under Kentucky law.

A motion requesting relief under Rule 60(b) is addressed to the discretion of the Court, *Marshall* v. *Monroe & Sons, Inc.*, 615 F. 2d 1156 (6th Cir. 1980); *H. K. Porter Co., Inc.* v. *Goodyear Tire & Rubber Co.*, 536 F. 2d 1115 (6th Cir. 1976); *Jacobs* v. *DeShelter,* 465 F. 2d 840 (6th Cir. 1972); *Douglass* v. *Pugh*, 287 F. 2d 500 (6th Cir. 1961); 7 Moore's *Federal Practice* ¶60.19; Wright & Miller, *Federal Practice and Procedure:* Civil §2857, 2863; and here it must be noted that both Bonded and Corum have been adjudged to be liable to the plaintiff under the promissory note and guaranty; moreover, there is no indication that the Bank will make a double recovery on its claim as it is required to repay SLT if the Bank recovers from Bonded or Corum. *See Sunderland* v. *City of Philadelphia,* 575 F. 2d 1089 (3d Cir. 1978). Finally, the cross-claims of Bonded and Corum are still very much alive and thus means for the determination of their ultimate liability in this matter are available to them. As stated by First American,

> There is nothing in the Loan Receipt and Agreement that will in any way affect the determination of the issues in this action between Bonded, Corum and SLT. There is no basis for Bonded's assertion that the Loan Receipt and Agreement permits "SLT to flank the defenses and set-offs Corum and Bonded have to SLT" or that it was used for the purpose of "obscuring the legal relationship between SLT and Corum and between SLT and Bonded . . . . The cross-claims between Bonded, Corum and SLT are still

> pending before this Court. Nothing in the Loan Receipt and Agreement adversely affects or obscures the relationships between SLT and Corum and between SLT and Bonded or the issues between them in this case, including the issue as to which party is responsible for the missing grain. As stated in the Court's order of dismissal of the Bank's complaint against SLT, "All other matters are reserved."

Memorandum of Plaintiff First American in Opposition to Defendants' Motion for Relief from Judgment, pp. 41-42.

Given these considerations, the Court would not be inclined to grant relief pursuant to 60(b) in this matter.

Due to the Court's ruling on this matter, it is deemed unnecessary to address the motions to compel presently made by Bonded and Corum.

DATED: February 10, 1982.

(s) Edward H. Johnstone
Judge
United States District Court

SUPREME COURT OF KENTUCKY

82-SC-729-D
(81-CA-960-MR & 82-CA-822-MR)

Bonded Elevator, Inc. - - - - - - *Movant*

v.

First National Bank of Louisville - *Respondent*

Jefferson Circuit Court
#81-CA-960-MR & #82-CA-822-MR

ORDER GRANTING MOTION FOR DISCRETIONARY REVIEW

The motion of Bonded Elevator, Inc. for a review of the decision of the Court of Appeals is granted.

The clerk of the Court of Appeals is directed to transfer to the clerk of the Supreme Court the entire records in this proceeding, File Nos. 81-CA-960-MR & 82-CA-822-MR.

Stephens, C.J., Aker, Leibson, Stephenson, Vance and Wintersheimer, J.J., sitting.

(s) Robert F. Stephens
Chief Justice

Entered February 9, 1983.

No. 83-51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BONDED ELEVATOR, INC. and
FRANK CORUM, Executor of the
Estate of Deceased Otto Corum,
Petitioners,

v.

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

W. PELHAM MCMURRY
MCMURRY & LIVINGSTON
Citizens Bank Building
P. O. Box 1700
Paducah, Kentucky 42001
(502) 443-6511
Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals misapplied or misinterpreted Kentucky State law in affirming the District Court's denial of Petitioners' motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

2. Whether the Court of Appeals abused its discretion in refusing to certify a question of Kentucky State law to the Supreme Court of Kentucky.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-51

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BONDED ELEVATOR, INC. and
FRANK CORUM, Executor of the
Estate of Deceased Otto Corum,
Petitioners,

v.

FIRST AMERICAN NATIONAL BANK
OF NASHVILLE,
Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' Statement of the Case includes argumentative and incorrect conclusions regarding the opinions below and omits a number of facts which warrant consideration by the Court in order to place the Petition in its proper perspective. A brief statement of the case will help to clarify the issues presented for review.

First American's Loan And Security

This case arises out of a financing arrangement between Respondent, First American National Bank ("First American") and the Petitioners, Bonded Elevator, Inc. ("Bonded") and Otto Corum ("Corum"). The arrangement involved a $2,500,000 working capital loan by First American to Bonded which was secured by grain stored in one of Bonded's grain elevators and guaranteed by Corum, Bonded's president and principal shareholder. First American perfected its security interest in the grain both by filing UCC financing statements in the appropriate places and taking possession of non-negotiable warehouse receipts issued by a field warehouseman, SLT Warehouse Company ("SLT"), under a field warehousing arrangement with Bonded. Under this arrangement, SLT established a field warehouse at Bonded's elevator at Calvert City, Kentucky. SLT would receive grain at the elevator and issue a non-negotiable warehouse receipt evidencing its delivery. The receipts, which recited that the grain would be held for the account of and be delivered upon the instructions of First American, were used by Bonded to obtain advances on the loan from First American.

First American's Judgments Against Bonded and Corum

This action was instituted after First American was advised that a large quantity of grain stored at the Calvert City elevator was discovered missing. First American made demand for payment on the note and guaranty and made a demand upon SLT to deliver the grain represented by the non-negotiable receipts. When no action was forthcoming, First American filed suit on December 13, 1978 against Bonded, Corum and SLT in the United States District Court for the Western District of Kentucky. Jurisdiction was based upon diversity of citizenship.

The suits against Bonded and Corum were premised upon the note and guaranty respectively. First American's action against

SLT, on the other hand, was for breach of contract based upon the warehouse receipts and for alleged negligent operation of the field warehouse. SLT and the Petitioners subsequently cross-claimed against each other regarding responsibility for the lost grain. These cross-claims are pending before the District Court and are set for trial on August 29, 1983.

On February 9, 1980, the District Court ruled on First American's motions for summary judgment against SLT, Bonded and Corum. The Court entered partial summary judgments against Bonded and Corum on the note and guaranty but denied the motion for summary judgment against SLT. Final judgments in favor of First American subsequently were entered by the District Court against Bonded on May 21, 1981 in the sum of $2,893,049.64 plus interest and against Corum on May 4, 1980 in the sum of $2,569,265.37 plus interest. These judgments were affirmed by the Court of Appeals on March 25, 1982. No petition for certiorari was filed with respect to these judgments.

The Loan Receipts

Following the entry of summary judgments against Bonded and Corum, First American renewed its motion for summary judgment against SLT. While that motion was pending, SLT entered into a Loan Receipt and Agreement with its insurance carriers by which the carriers loaned SLT $2,350,000 without interest, repayable to the extent of any recovery SLT may obtain from Bonded, Corum or any other person arising from the note, guaranty or the disappearance of the grain. Thereafter, SLT entered into a Loan Receipt and Agreement with First American by which, in consideration for First American's dismissal of SLT with prejudice, SLT loaned $2,350,000 to First American, repayable to the extent of any net monetary recovery which First American may obtain from Bonded, Corum, or any other person arising from the disappearance of the grain. In the agreement, First American expressly reserved its claim against

Bonded, any officers, directors, shareholders, employees and agents of Bonded, Corum, or any of Bonded or Corum's affiliates, or against any other person. Thereafter on December 30, 1980 First American dismissed its suit against SLT with prejudice. The Order of dismissal recited that "all other matters are reserved."

Bonded and Corum's Rule 60(b) Motion

While the summary judgments against Bonded and Corum were on appeal to the United States Court of Appeals for the Sixth Circuit, Bonded and Corum filed a motion in the District Court for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. The motion was based solely upon the loan receipt transaction. Bonded and Corum claimed that the execution of the loan receipt somehow constituted a payment, satisfaction, or release of their judgment obligations to First American.

After extensive briefing of the issue, a hearing, and additional discovery, the District Court denied Bonded and Corum's motion on February 11, 1982. Contrary to Petitioners' contention, the District Court's ruling was not based solely upon the "continued pendency of Corum and Bonded's cross-claim against SLT" (p. 4). That was only one of several reasons. Thus the District Court said (Appendix p. 5a):

> A motion requesting relief under Rule 60(b) is addressed to the discretion of the Court . . . and here it must be noted that both Bonded and Corum have been adjudged to be liable to the plaintiff under the promissory note and guaranty; moreover, there is no indication that the Bank will make a double recovery on its claim as it is required to repay SLT if the Bank recovers from Bonded or Corum. *See Sunderland* v. *City of Philadelphia,* 575 F.2d 1089 (3d Cir. 1978). Finally, the cross-claims of Bonded and Corum are still very much alive and thus means for the determination of their ultimate liability in this matter are available to them.

Petitioners then filed an appeal to the Sixth Circuit Court of Appeals. During the appeal, Bonded and Corum moved the Court of Appeals for a stay pending final decision of a state case not involving First American which was pending in the Kentucky state court system. Bonded and Corum alternatively argued in their motion to the Court that the state case be certified to the Kentucky Supreme Court. The case involved an identical financing arrangement between SLT, Bonded, and another bank. Suit was filed by the bank against Bonded and SLT after the grain stored in another elevator was discovered missing. A loan receipt identical to that involved in this action had been entered into by SLT and the bank. In that case, the Kentucky Circuit Court also had denied Bonded's motion for relief from a summary judgment against Bonded, and that judgment of denial of relief as well as the summary judgment had been affirmed on appeal to the Court of Appeals for the Commonwealth of Kentucky.

The Circuit Court of Appeals denied Petitioners' motion for a stay but granted them the right to raise the certification issue on the appeal. Following briefing and argument, the Court thereafter entered an order affirming the District Court's denial of the Rule 60(b) motion. That affirmance did not, as Petitioners contend (p. 6) foreclose Petitioners from asserting their "jural rights" against SLT. The pending cross claims between Petitioners and SLT are set for trial in the District Court on August 29, 1983.

Petitioners thereafter filed a petition for rehearing based upon the Kentucky Supreme Court's decision to grant discretionary review in the companion case and asked, in the alternative, for certification of the question to the Kentucky Supreme Court. After requesting and receiving a reply brief from First American, the Court denied the petition. Petitioners then filed their petition for certiorari.

SUMMARY OF REASONS WHY THE WRIT SHOULD BE DENIED

Petitioners are challenging the Court of Appeals' decision in a diversity case affirming a denial of their motion for relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure. Petitioners' sole claim is that the Court of Appeals departed from the accepted and usual course of proceedings in refusing to certify an alleged controlling state law question to the Kentucky Supreme Court and in incorrectly applying and interpreting Kentucky law.

The decision of the Court of Appeals is entirely consistent with the accepted and usual course of judicial proceedings for the following reasons:

(1) The Court of Appeals' affirmance of the District Court's denial of Petitioners' Rule 60(b) motion was a proper and sound exercise of the Court's discretion. The Court of Appeals chose not to abdicate its responsibility to decide a state law question presented to it for review and instead interpreted state law on a question which was far from novel or unsettled under Kentucky law. Indeed, there are abundant Kentucky cases supporting the validity of loan receipt transactions. The Court of Appeals' reliance on the decision of the District Court sitting in Kentucky and on the reasoning of the Kentucky Court of Appeals in a state case clearly is consistent with applicable Kentucky case law.

(2) The same conclusion applies to the Court of Appeals' decision not to certify the state law question to the Kentucky Supreme Court. In view of the Kentucky precedents and the status of the litigation, there were no novel or unsettled questions which the Court considered incapable of determining without certification. Certification only would have further prolonged this protracted litigation at additional delay and expense to Respondent. Exercise of the Court of Appeals' discretion in denying certification clearly was in accord with the accepted and usual course of judicial proceedings.

(3) Petitioners have failed to show any special and important reasons which warrant this Court's exercise of certiorari review. The issues raised by the Petitioners will have little, if any, effect upon anyone but the parties to this litigation.

REASONS FOR DENYING THE WRIT

The sole issue before this Court is whether the Court of Appeals' actions in affirming the District Court's denial of Petitioners' motion for relief from judgment based upon its interpretation of Kentucky state law constitutes a special and important reason for the Court's review of this case. Petitioners contend not only that the Court of Appeals abused its discretion by deciding the case without certifying a state law issue to the Kentucky Supreme Court, but that its interpretation of Kentucky law was fundamentally incorrect. Not only are these contentions insufficient to warrant this Court's review, but they are totally without merit.

A. The issues presented by Petitioners are not sufficiently special and important to warrant certiorari review.

This case is a simple collection suit on a note and a guaranty which have been reduced to final judgments. This Petition is but one in a long series of efforts to prolong this litigation and to avoid Petitioners' obligations to satisfy final judgments against them in excess of $2,500,000 entered by the District Court and affirmed by the Court of Appeals.

It is important to note that the cross claims pending in the District Court between Petitioners and SLT have been set for trial in the District Court on August 29, 1983. While a principal contention of Petitioners throughout this appeal has been that the loan receipt transaction somehow allows SLT to avoid Petitioners' defenses and cross claims and distorts the jural relations between the parties, the existence and trial of those cross claims moots this contention.

This Petition only involves a challenge to a Court of Appeals' interpretation of state law on a narrow issue involving loan receipts between a plaintiff and one co-defendant in a civil suit in Kentucky. It does not involve any issues "of national importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Cemetery, Inc.* 349 U.S. 70, 74 (1954).

Petitioners' assertion that the Court of Appeals decision upholds the use of a loan receipt "where that use had been forbidden by prior decision of the Kentucky appellate court of last resort" (p. 19) is blatantly incorrect. The Court of Appeals' decision is not in conflict with any existing Kentucky decision and is in fact consistent with established judicial precedent in the state. What Petitioners challenge is the normal exercise of the Court of Appeals' discretion to decide and interpret state law. The Court of Appeals' decision in this regard is no different than thousands which have been rendered by the federal appellate courts. Clearly, the exercise of judgment by the Court of Appeals in this case is not of far-reaching or national importance. And consideration of the appellate court's decision only for the benefit of Petitioners is not sufficient to merit review by this Court. *Rice* v. *Sioux City Cemetery, Inc.* 349 U.S. 70, 74 (1955).

Nor does this case involve questions which impact upon the issue of uniformity between state and federal law. In this case, there is nothing to suggest that the Court of Appeals attempted to disregard established state law or insert its judgment for that of the Kentucky Supreme Court. The Court of Appeals entered a reasoned decision, after extensive briefing and argument, in accord with the reasoning of the District Court and Kentucky law. By no means was this a departure from the accepted and usual course of judicial proceedings. Nor is there anything to suggest that denial of this petition will undermine the principles of *Erie* or disrupt the administration of justice between the state and federal courts.

B. The Court of Appeals' decision is not in conflict with applicable Kentucky Supreme Court precedent.

Petitioners' contention that the Court of Appeals' decision affirming the denial of their motion for relief from judgment conflicts with the Kentucky Supreme Court decision in *Biven* v. *Charlie's Hobby Shop,* 500 S.W.2d 597 (Ky.Ct.App. 1973), is totally without merit. Loan receipts consistently have been upheld by the Kentucky courts beginning with the decision by the Kentucky Court of Appeals in *State Farm Mutual Auto Ins. Co.* v. *Hall,* 292 Ky. 22, 165 S.W.2d 838 (1949). *E.g.*, *Ratcliff* v. *Smith,* 298 S.W.2d 18 (Ky.Ct.App. 1957); *Aetna Freight Lines, Inc.* v. *R. C. Tway Co.,* 298 S.W.2d 293 (Ky.Ct.App. 1956). These cases all hold that loan receipts constituted valid loans rather than payments. In each case, the court looked to the intention of the parties to the transaction. If the parties intended it to be a loan, that intention is upheld by the Kentucky Courts.

The *Biven* case cited by Petitioners in support of their position is in fact consistent with this analysis. In *Biven,* however, the Court found as a matter of fact that the parties intended that the instrument be a release of the defendants rather than a loan, and it was noted that there was no contractual relationship between the parties to the loan receipt. The Court therefore held that the agreement between the plaintiff and the insurer of the defendants constituted a payment and a release. Unlike *Biven,* in the present case the parties clearly intended to make a loan, and there was in fact a contractual relationship between Respondent and SLT, the contract created by the warehouse receipts.

The Court of Appeals' decision upholding the loan receipt transaction is by no means inconsistent with Kentucky precedent or in conflict with *Biven.* By the terms of the loan receipt itself, Respondent must repay the loan out of its recovery against Petitioners. As a result, Respondent will not be receiving

a double recovery as urged by Petitioners (p. 20). Moreover, contrary to Petitioners' contention, the agreement is not champertous under Kentucky law. *Aetna Life Insurance Co.* v. *Weck*, 163 Ky. 37, 173 S.W. 317 (1915); *Wemhoff* v. *Rutherford*, 98 Ky. 91, 32 S.W. 288 (1895). And by dismissing SLT as a party to the lawsuit after judgment against Petitioners has been affirmed, none of the potential abuses condemned in the cases and articles cited by Petitioners (pages 25-27) could exist in this case.

C. **The Court of Appeals' interpretation of Kentucky law was consistent with its Erie obligations and did not depart from the accepted and usual course of judicial proceedings.**

The principal ground advanced by Petitioners for certiorari review is that the Court of Appeals interpreted Kentucky law in a manner inconsistent with its *Erie* obligations. This contention is without merit.

It is well-settled that interpretations of state law in diversity cases primarily are left to the Courts of Appeals and, through them, the District Courts. *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949). This Court consistently has expressed a general reluctance to "overrule decisions by federal courts skilled in the law of particular states unless their conclusions are shown to be unreasonable." *Propper* v. *Clark*, 337 U.S. 472, 486-487 (1949); *Bishop* v. *Wood*, 426 U.S. 341, 346 n.10 (1976). Thus, in refusing to review a Court of Appeals' determination of state law, this Court said:

> In this Court the parties have argued the state-law question at great length....We decline to review the state-law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Butner v. *United States*, 440 U.S. 48, 57-58 (1979).

Similarly, the Court said in *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U.S. 280, 281 (1942):

> No decision of the Supreme Court of Michigan, or of any other court of that State construing the relevant Michigan law has been brought to our attention. In the absence of such guidance, we shall leave undisturbed the interpretation placed upon purely local law by a Michigan federal judge of long experience and by three circuit judges whose circuit includes Michigan.

As in *MacGregor*, this Court is being asked to review an interpretation of Kentucky state law made by three Circuit Court of Appeals judges from the Circuit which includes Kentucky and by a Kentucky District Court judge of long experience.

Under *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938), the Court of Appeals was obligated to apply the law of the state's highest court. It is an established principle, however, that:

> If the highest court has not spoken, the federal court must ascertain from all available data what the state law is and apply it. If the state appellate court announces a principle and relies upon it, that is a datum not to be disregarded by the federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. *See West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 236-37, 61 S. Ct. 179, 183, 85 L.Ed. 139 (1940); *Ruth* v. *Bituminous Casualty Corp.*, 427 F.2d 290, 292 (6th Cir. 1970).

Clutter v. *Johns-Manville Sales Corp.*, 646 F.2d 1151, 1153 (6th Cir. 1981).

It also is established that a court may give considerable deference to an opinion on the issue by an experienced District Court judge sitting in that state. *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 204 (1956); *Filley* v. *Kickoff Publishing Co.*, 454 F.2d 1288, 1291 (6th Cir. 1972).

The Court of Appeals' decision in this case was entirely in accord with these principles of *Erie*. The parties briefed and argued the relevant Kentucky decisions to the Court. As discussed more fully in part B, *supra,* the relevant Kentucky case law consistently has recognized the validity of loan receipt agreements. In reaching its decision, the Court of Appeals found the reasoning advanced by the District Court and the Kentucky Court of Appeals confronted with similar issues and the same case law to be particularly persuasive. This decision was entirely in accord with the Court's obligation under *Erie* and did not constitute an unreasonable interpretation of state law.

For this same reason, there is no basis whatsoever to Petitioners' assertion in Part B of their Petition (p. 16) that the Court of Appeals improperly relied upon the "non-final opinion" of the Kentucky Court of Appeals in reaching its decision. What is clear is that the Court of Appeals found the Kentucky court's reasoning a persuasive indicator in ascertaining state law, a ruling which it found to be in accord with the District Court's decision. Since the Court was obligated to ascertain and decide the state law question, its use of these sources in ascertaining and interpreting Kentucky law was not in error. Moreover, it should be noted that the identical argument was made by Petitioners to the Court of Appeals on appeal and on petition for rehearing. The Court's rejection of that argument demonstrates that the Kentucky Supreme Court's decision to grant discretionary review of the Kentucky Court of Appeals' decision did not alter its interpretation of Kentucky law.

D. The Court of Appeals' decision to decide a state law question rather than certify it to the Kentucky Supreme Court was not an abuse of discretion.

The reasons for denying further review of the Court of Appeals' decision interpreting state law apply with equal force with respect to Petitioners' argument that the state law question

should have been certified to the Kentucky Supreme Court. No basis exists in the applicable case law for overturning or altering the Court of Appeals' decision to exercise its obligation in a diversity case to decide the state law question before it for review. *Meredith* v. *City of Winter Haven,* 320 U.S. 228, 234-35 (1943).

In sanctioning the use of the certification procedure in *Lehman Brothers* v. *Schein,* 416 U.S. 386 (1974), this Court emphasized that the decision to certify a question to a state Supreme Court is discretionary with the appellate court. In this regard, this Court said:

> We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. *Its use in a given case rests in the sound discretion of the federal court.*

Id. at 390-91 (emphasis added).

Similarly, the concurring opinion in *Lehman* stated:

> [I]n a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisrudence.
>
> . . . .
>
> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Id. at 394-95 (Rehnquist, J., concurring).

In following the dictates of *Lehman Brothers,* the courts of appeal have refused to employ certification where they considered themselves capable of deciding the state law question. The undue delay and expense inherent in the process also has been cited as an additional reason for refusing to certify. *Florida ex rel. Shevin* v. *Exxon Corp.,* 526 F.2d 266 (5th Cir.) *cert. denied,* 429 U.S. 829 (1976). Thus, in *Marston* v. *Red River Levee & Drainage Dist.,* 632 F.2d 466, 468 n.3 (5th Cir. 1980), the Fifth Circuit refused to certify a question to the Louisiana Supreme Court based in part upon the following reasons:

> First, this cause is long in the tooth and should be disposed of if that can be done by us with confidence. Second, the law involved seems clear on its face, and we are relatively certain of its meaning.

Application of the same considerations provides additional support for the Court of Appeals' decision. The state law question regarding loan receipts was entirely clear. Since the first Kentucky decision in *State Farm Mutual Auto Insurance Co.* v. *Hall,* 292 Ky. 22, 165 S.W.2d 838 (1942), the Kentucky courts consistently have upheld the use of loan receipts. The Court also had the guidance of the Kentucky Court of Appeals' decision on an almost identical fact situation as well as the decision of the District Court. The case law in the area therefore was far from unsettled and more than sufficient precedent existed for the Court of Appeals to examine in making its decision. Nothing in the Court of Appeals' decision constituted a departure from those precedents.

The present case therefore is totally different from the decisions cited by Petitioners. *Lehman Brothers* involved judges in the Second Circuit ascertaining a novel, unsettled question of Florida law in reviewing a decision of a New York District Court. Thus, this Court said:

> Here resort to it [certification] would seem particularly appropriate in view of the novelty of the question and the

> great unsettlement of Florida law, Florida being a distant State. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as "outsiders" lacking the common exposure to local law which comes from sitting in the jurisdiction.

Id. at 391.

Here, circuit judges from the circuit which included Kentucky were reviewing a decision from a District Court judge sitting in the State of Kentucky on an issue which was far from novel or unsettled.

Unlike the present case, *Wecker* v. *Kilmer,* 471 F.2d 782, 783 (7th Cir. 1972), involved certification where there was "no clear controlling precedents" under the applicable Indiana law. Similarly, in *Maryland Casualty Company* v. *Hallatt,* 326 F.2d 275 (5th Cir.), *cert. denied,* 337 U.S. 932 (1964), there was no precedent in the applicable Florida law on the question in issue (295 F.2d 64), but before the litigation was terminated in the Federal Court, a Florida decision squarely ruled on the issue, and then the Fifth Circuit Court of Appeals granted a rehearing.

In this case, with ample Kentucky precedents, the Circuit Court had no reason for abdicating its obligation to decide the case before it. Its decision to decide the issue rather than certify the question was not an abuse of discretion, much less a substantial departure from the usual and accepted course of judicial proceedings.

CONCLUSION

For all the foregoing reasons, the Petition For Certiorari to the Sixth Circuit Court of Appeals should be denied.

Respectfully Submitted,

W. Pelham McMurry
McMurry & Livingston
Citizens Bank Building
P. O. Box 1700
Paducah, Kentucky 42001
(502) 443-6511
Attorneys for Respondent